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PARLAN DADEH

v.

PP

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FEDERAL COURT, PUTRAJAYA
ZAKI TUN AZMI PCA
NIK HASHIM FCJ
AUGUSTINE PAUL FCJ
[CRIMINAL APPEAL NO: 05-31-2006 (P)]

C

19 SEPTEMBER 2008

CRIMINAL PROCEDURE: *Mens rea - Dangerous drugs - Trafficking - Whether mens rea for possession of drugs proven by prosecution - Whether appellant had knowledge of nature of drugs - Sufficient for prosecution to prove facts from which it could properly be inferred that accused had necessary knowledge - Court of Appeal's decision in Toh Su Kuan v. PP not followed*

D

CRIMINAL PROCEDURE: *Mens rea - Inference from facts established - Evidence of conduct - Accused arrested for dangerous drug offence - Accused looking stunned, nervous, scared or frightened when arrested - Whether such evidence of conduct admissible - Degree of proof required to establish evidence of conduct - Section 8 Evidence Act 1950 - Whether conduct is influenced by any fact in issue or relevant fact - More detailed evidence required where conduct sought to be established is a matter of perception - Once admitted onus is on accused to explain his conduct pursuant to s. 9 Evidence Act 1950 - Failure by accused to explain his conduct*

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Acting on information received relating to the trafficking of drugs, a team of police personnel had observed the appellant in a restaurant before arresting him. When the police identified themselves, the appellant looked shocked or stunned. A search of his person was conducted and a black plastic bag was found tucked away in the front of the jeans worn by him. Inside the black plastic bag was a transparent plastic bag containing 436.2 grams of cannabis or ganja. The appellant was charged for trafficking in the said drugs. At the trial, the appellant claimed that the drugs were never found on the appellant's person as alleged by the prosecution. It was suggested that the drugs belonged to an Indian male called Bob who was in the restaurant at that time.

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It was also suggested that the drugs had actually been recovered from a chair next to where Bob had sat. At the close of the prosecution case the trial judge called upon the appellant to enter his defence having invoked the presumption of trafficking in s. 37(da) of the Dangerous Drugs Act 1952. The High Court found that the person called Bob did not exist at all and was a creation of the defence. The judge found that the case against the appellant had been proved beyond reasonable doubt and, accordingly, convicted him of trafficking in the said drugs and imposed the death sentence. The appellant appealed against the conviction and sentence. The Court of Appeal upheld the conviction and sentence. The appellant further appealed on, *inter alia*, the following issues: (i) that the Court of Appeal had erred in not holding that the prosecution had not proved *mens rea* possession of the drugs; had erred in not holding that there was no evidence of knowledge of the nature of the drugs by the appellant and had thereby misdirected itself in not following its previous decision in *Toh Su Kuan v. PP*; and (ii) The Court of Appeal held that the conduct of the appellant in being stunned or shocked when PW4 identified himself to him as a police officer was certainly relevant when judged against the circumstances of the case. However, the court agreed that the reaction of the appellant in itself would be insufficient to draw the inference of *mens rea* possession. Counsel argued that the conduct of the appellant should not be held against him as even an innocent man can be shocked or stunned in such circumstances.

Held (dismissing the appeal)
Per Augustine Paul FCJ:

(1) Proof of knowledge is very often a matter of inference. The material from which the inference of knowledge can be drawn varies from case to case. It would be sufficient for the prosecution to prove facts from which it could properly be inferred that the accused had the necessary knowledge. The ratio decidendi of *Toh Su Kuan v. PP* is thus inconsistent with settled legal principles. In particular it conflicts with the correct statement of the law in the Court of Appeal case of *Wong Nam Loi v. PP* and the application of the principles in the judgment of this court in *Tunde Apatira & Ors v. PP*. The Court of Appeal was therefore justified in this case in disregarding *Toh Su Kuan v. PP* [2005] 3 CLJ 740 as the rule

of precedent allows it to choose which of its past conflicting decisions it will follow. The submission advanced by the appellant was therefore without any merit. (para 25)

(2) If there is no evidence to show that the conduct is influenced by any fact in issue or relevant fact as required by s. 8 Evidence Act 1950 ('EA'), then it is not admissible as it would then be an equivocal act justifying inferences favourable to the accused being drawn. If it satisfies the requirement of section 8 EA it is admissible. The degree of proof required to establish evidence of conduct would depend on the nature of the conduct. Conduct like the flight of an accused is a more positive act and is easily established. On the other hand conduct like the accused looking stunned, nervous, scared or frightened is very often a matter of perception and more detailed evidence may be required. Once admitted the court cannot resort to any other explanation for the conduct or draw inferences on its own accord to render it inadmissible. The onus is on the accused to explain his conduct pursuant to s. 9 EA. (para 36)

(3) The reaction of the appellant in looking stunned or shocked upon being approached by the police was clearly admissible under s. 8 EA since it had a direct bearing on the fact in issue as the drugs found were tucked away in the front of the jeans worn by him. The explanation for his reaction must therefore be offered by the Appellant himself as required by s. 9 EA. In his defence the Appellant did not offer any explanation at all for his reaction upon being approached by the police. It could therefore be validly used as evidence against him. The inference to be drawn from the evidence of conduct of the appellant against the background of the other evidence was that he knew what he was carrying. (para 38)

Per Nik Hashim FCJ:

(1) The Court of Appeal's decision in *Toh Su Kuan v. PP* was erroneous and should be overruled. (para 5)

Bahasa Malaysia *Translation Of Headnotes*

Bertindak atas maklumat yang diterima yang berhubungan dengan mengedar dadah, sebuah pasukan pegawai polis telah memerhati perayu di dalam sebuah restoran sebelum menangkapnya. Apabila polis mengenal diri mereka, perayu nampak terkejut atau

terperanjat. Beliau diperiksa dan sebuah beg plastik hitam dijumpai dalam bahagian depan seluar yang dipakai olehnya. Di dalam beg plastik hitam itu terdapat sebuah beg plastik jernih yang mengandungi 436.2 gram kanabis atau ganja. Perayu telah dituduh mengedar dadah tersebut. Pada perbicaraan, perayu mendakwa bahawa dadah itu tidak dijumpai tersembunyi di badannya seperti yang dikatakan oleh pendakwaan. Ia telah dihujah bahawa dadah itu kepunyaan seorang lelaki India bernama Bob yang berada di restoran itu pada masa itu. Ia juga dihujah bahawa dadah itu telah diperolehi dari sebuah kerusi yang terletak di sebelah tempat duduk Bob. Pada penghujung kes pendakwaan hakim perbicaraan meminta perayu membuat pembelaannya setelah menggunakan anggapan mengedar di bawah s. 37(da) Akta Dadah Berbahaya 1952. Mahkamah Tinggi memutuskan bahawa orang yang dipanggil Bob itu tidak wujud dan merupakan suatu rekaan pembelaan. Hakim seterusnya memutuskan bahawa kes terhadap perayu telah dibuktikan melampaui keraguan munasabah dan, oleh yang demikian, sabit beliau kerana mengedar dadah dan mengenakan hukuman mati. Perayu merayu terhadap sabitan dan hukuman itu. Mahkamah Rayuan mengesahkan sabitan dan hukuman itu. Perayu lepas itu merayu terhadap, di antara lain, isu-isu berikut: (i) bahawa Mahkamah Rayuan telah khilaf apabila tidak memutuskan bahawa pendakwaan telah tidak membuktikan milikan *mens rea* dadah itu; telah khilaf apabila tidak memutuskan bahawa tiada keterangan tentang pengetahuan sifat dadah itu oleh perayu dan, oleh itu, telah tersalah arah dengan tidak mengikuti keputusannya yang lebih awal dalam *Toh Su Kuan v. PP*; dan (ii) Mahkamah Rayuan memutuskan bahawa kelakuan perayu iaitu reaksi terperanjat dan terkejut beliau semasa PW4 mengenal dirinya sebagai seorang pegawai polis pastinya relevan apabila dipertimbangkan terhadap halkeadaan kes ini. Walau bagaimanapun, mahkamah bersetuju bahawa reaksi perayu itu secara sendiri tidak mencukupi untuk membuat inferens milikan *mens rea*. Kaunsel berhujah bahawa kelakuan perayu tidak seharusnya digunakan terhadapnya kerana seseorang yang tidak bersalah mungkin juga akan terkejut dan terperanjat dalam keadaan sebegitu.

Diputuskan (menolak rayuan)
Oleh Augustine Paul HMP:

(1) Pembuktian pengetahuan kerap merupakan perkara yang berdasarkan inferens. Bahan dari mana inferens pengetahuan boleh didapat berubah dari kes ke kes. Ia mencukupi untuk

pendakwaan membukti fakta-fakta dari mana inferens boleh dibuat bahawa tertuduh mempunyai pengetahuan yang perlu. *Ratio decidendi Toh Su Kuan v. PP*, oleh itu, tidak konsisten dengan prinsip-prinsip mantap undang-undang. Terutamanya ia berkonflik dengan pernyataan betul undang-undang dalam kes Mahkamah Rayuan *Wong Nam Loi v. PP* dan pemakaian prinsip-prinsip dalam penghakiman mahkamah ini dalam *Tunde Apatira & Ors v. PP*. Mahkamah Rayuan, oleh itu, berjustifikasi dalam kes ini dengan tidak mengendahkan *Toh Su Kuan v. PP* kerana rukun duluan membenarkan ia memilih mana di antara keputusan terdahulunya ia akan ikut. Hujahan yang dikemukakan oleh perayu, oleh itu, tidak mempunyai apa-apa merit.

(2) Jika tiada apa-apa keterangan untuk menunjukkan bahawa kelakuan itu telah dipengaruhi oleh apa-apa fakta dalam isu atau fakta relevan seperti yang diperlukan oleh s. 8 Akta Keterangan 1950 ('AK'), ia tidak boleh diterima kerana ia akan menjadi suatu perbuatan taksa yang menjustifikasi inferens yang berpihak ke tertuduh dibuat. Jika ia memenuhi keperluan s. 8 AK ia boleh diterima. Tahap pembuktian yang diperlukan untuk membuktikan keterangan kelakuan bergantung kepada sifat kelakuan itu. Kelakuan seperti perlarian tertuduh ialah satu perbuatan yang positif dan mudah dibuktikan. Sebaliknya, kelakuan seperti tertuduh nampak terperanjat, gelisah, takut atau gerun ialah kerap sesuatu perkara berkaitan dengan persepsi dan keterangan yang lebih terperinci mungkin diperlukan. Sekali diterima mahkamah tidak boleh gunakan penerangan lain bagi kelakuan atau membuat inferens ikut kehendak sendiri untuk membuatnya tidak boleh diterima. Onus terletak atas tertuduh untuk menerangkan kelakuannya mengikut s. 9 AK.

(3) Reaksi perayu nampak terperanjat atau terkejut apabila dihampiri oleh polis jelas boleh diterima di bawah s. 8 AK kerana ia mempunyai hubungan terus terhadap fakta dalam isu kerana dadah itu dijumpai dalam bahagian depan seluar yang dipakai oleh beliau. Penerangan untuk reaksinya mesti diberi oleh perayu sendiri seperti yang diperlukan oleh s. 9 AK. Dalam pembelaannya perayu tidak memberi apa-apa penerangan bagi reaksinya apabila dihampiri oleh polis. Ia, oleh itu, boleh digunakan sebagai keterangan terhadapnya. Inferens

yang boleh dibuat dari keterangan kelakuan perayu terhadap latar belakang keterangan lain ialah bahawa beliau tahu apa yang dibawa olehnya.

Oleh Nik Hashim HMP:

(1) Keputusan Mahkamah Rayuan dalam *Toh Su Kuan v. PP* adalah salah dan patut ditolak.

Case(s) referred to:
Abdullah Zawawi Yusoff v. PP [1993] 4 CLJ 1 SC ***(refd)***
Che Omar Mohd Akhir v. PP [2007] 3 CLJ 281 FC ***(refd)***
Chow Kok Keong v. PP [1998] 2 CLJ 469 FC ***(refd)***
Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***
DPP v. Brooks [1974] 2 All ER 840 ***(refd)***
Emmanuel Yaw Teiku v. PP [2006] 3 CLJ 597 FC ***(refd)***
Herchun Singh & Ors v. PP [1969] 2 MLJ 209 ***(refd)***
Kuldip Sharma v. The State [1996] Cri LJ 244 ***(refd)***
Ong Ah Chuan v. PP [1981] 1 MLJ 64 ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Chia Leong Foo [2000] 6 MLJ 705 ***(refd)***
PP v. Karim AB Jabar [2008] 5 CLJ 173 CA ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
R v. Stephenson [1904] 68 JP 524 ***(refd)***
Toh Su Kuan v. PP [2005] 3 CLJ 740 CA ***(ovrd)***
Tunde Apatira & Ors v. PP [2001] 1 CLJ 381 FC ***(refd)***
Young v. Bristol Aeroplane Co Ltd [1944] 1 KB 718 ***(refd)***
Wong Nam Loi v. PP [1998] 1 CLJ 37 CA ***(refd)***
Ye Wei Gen v. PP [1999] 4 SLR 101 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 112
Dangerous Drugs Act 1952, ss. 37(d), (da)(i), 39B
Evidence Act 1950, ss. 8, 9

Other source(s) referred to:
Cross and Harris, *Precedent in English Law,* 4th edn, p 63
Sarkar on Evidence, 15th edn, pp 175, 194, 204

For the appellant - Gurbachan Singh; M/s Bachan & Kartar
For the respondent/PP - Manoj Kurup DPP

[Appeal from Court of Appeal; Criminal Appeal No: P-05-43-2003]

Reported by Amutha Suppayah

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JUDGMENT

Nik Hashim FCJ:

[1] I find myself in complete agreement with the opinions expressed by my learned brother, Augustine Paul, FCJ and I concur that the appeal be dismissed and the conviction and sentence imposed on the appellant are hereby confirmed.

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[2] However, I wish to add a few words on *Toh Su Kuan v. Public Prosecutor* [2005] 3 CLJ 740 which was relied upon by the appellant to support his appeal.

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[3] In that case, the accused was convicted under s. 39B of the Dangerous Drugs Act 1952 (the Act) for trafficking in 1,584.93 grams of heroin and sentenced to death.

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[4] The facts of that case are that the accused was arrested at a bus station and escorted to a police station, whereupon, he was searched and 356 small packets were found on different parts of his body. 62 packets were found in his left shoe; 60 packets in his right shoe; 57 packets were found strapped to his left shin and an equal number tied to his right shin. 60 packets were found tied to his waist in the front and an equal number fastened to his waist at the back. At the trial, the prosecution sought to establish 'trafficking' under s. 37(da)(i) of the Act by way of direct and/or circumstantial evidence of 'possession'. The statutory presumption of possession under s. 37(d) of the Act was not relied upon. At the conclusion of the trial, the learned trial judge expressed the view that the manner in which the packets were concealed pointed to the accused having knowledge that the packets contained heroin. The Court of Appeal ruled otherwise, holding that *mens rea* possession had not been established and thereby acquitted the accused.

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[5] With respect, I am unable to agree with the Court of Appeal in that case. In my judgment, the learned High Court Judge there on the facts correctly found that the accused had knowledge of the heroin. The manner in which 356 small packets were found on different parts of his body irresistibly supports the conclusion that the accused was having *mens rea* possession of the drugs at the time of his arrest. Likewise in the present appeal, it was none other than the accused in that case who could have

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concealed the drugs on his body. Therefore, a reasonable tribunal armed with the same facts and properly directing itself would have concluded that the accused was having *mens rea* possession of the drugs, independently of the presumption of possession under s. 37(d) of the Act. Thus, the Court of Appeal's decision in *Toh Su Kuan* was erroneous and should be overruled (see *Tunde Apatira & Ors v. Public Prosecutor* [2001] 1 CLJ 381 FC).

Augustine Paul FCJ:

[6] This is an appeal to this court by the accused ("the appellant") whose conviction and sentence for trafficking in dangerous drugs by the High Court was upheld by the Court of Appeal.

[7] Briefly stated the facts of the case are as follows:

[8] On 8 November 2000 PW4 (Inspector Gnanaaputham) who was attached to the Narcotics Division at Seberang Perai Tengah Police Station received information relating to the trafficking of drugs. PW4 together with a team of police personnel then proceeded to the Zamrud Restaurant at Juru. They arrived at the scene at about 3.15pm and took their positions. PW4 saw the appellant seated at a table. He observed the appellant for about five to ten minutes from outside the restaurant. He and his team then entered the restaurant and took their seats. PW4 sat down at the table next to where the appellant was sitting. Upon seeing the appellant leaving the restaurant PW4 arrested him. The other police personnel surrounded the appellant to prevent him from absconding. PW4 then identified himself as a police inspector. On hearing this, the appellant looked shocked or stunned. A search of his person was conducted and a black plastic bag was found tucked away in the front of the jeans worn by him. Inside the black plastic bag was a transparent plastic bag containing a compressed block of dried plants suspected to be cannabis. Subsequent tests by the chemist revealed this to be 436.2 grams of the proscribed drug, cannabis or ganja. The appellant was charged for trafficking in the said drugs. At the trial, it was put to PW4 that the drugs were never found on the appellant's person as alleged by the prosecution. It was suggested that the drugs belonged to an Indian male called Bob who was in the restaurant at that time. It was also suggested that the drugs had actually been recovered from a chair next to where Bob had sat. All these suggestions were denied by PW4 and the other prosecution

witnesses present at the scene and who were called to give evidence. At the close of the prosecution case the learned trial judge called upon the appellant to enter his defence having invoked the presumption of trafficking in s. 37(da) of the Dangerous Drugs Act 1952 ("the Act"). He elected to give evidence on oath. Essentially, he repeated what had been put to the prosecution witnesses. He said that he and Bob were arrested and they were taken to his house at Taman Pelangi. At that time one Murhaban bin Umar who was inside the house opened the door. It was the finding of the High Court that the person called Bob did not exist at all and was a creation of the defence. The High Court also found that even though Murhaban bin Umar existed he was not in the appellant's house at the time the police went there. The learned judge then found that the case against the appellant had been proved beyond reasonable doubt and, accordingly, convicted him of trafficking in the said drugs and imposed the death sentence. The appellant appealed against the conviction and sentence.

[9] In upholding the conviction and sentence of the High Court Gopal Sri Ram JCA in writing for the Court of Appeal said:

> 4. Before us, learned counsel for the accused accepted the findings of fact made by the High Court. There was no complaint that the High Court had erred in the handling of the facts. The burden of learned counsel's submission was that based on the prosecution's evidence, all that had been established was mere possession and not what has come to be called "*mens rea* possession". To appreciate this submission it is necessary to hearken to the presumption created by section 37(da) of the Act and to discuss some of the cases that have explained the way in which that provision is to be applied.
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> 5. Section 37(da) in its material portion provides as follows:
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> > 37 In all proceedings under this Act or any regulation made thereunder:
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> > (da) any person who is found in possession of:
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> > (vi) 200 grammes or more in weight of cannabis, otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug; …

6. In *Muhammed bin Hassan v. Public Prosecutor* [1998] 2 MLJ 273, the Federal Court held that for the presumption to apply, the trial judge must make a positive finding of actual possession of the proscribed drug by an accused person. And very recently in *Public Prosecutor v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457, the Federal Court held that to establish "possession" under section 37 (da), the prosecution must prove that:

> The possessor must be aware of his possession, must know the nature of the thing possessed and must have the power of disposal over it. Without these characteristics possession raises no presumption of *mens rea.* Without *mens rea* possession cannot be criminal except in certain cases created by statute, which is not applicable in this case." *Saad Ibrahim v Public Prosecutor* [1968] 1 MLJ 158, per Yong J.

7. It is clear from the judgment of the learned judge that she held the accused to have *mens rea* possession. The only issue therefore is whether she was right in doing so. Learned counsel for the accused has argued that the learned judge erred in inferring that the accused had *mens rea* possession and relied on two matters in support. First, the fact that the drug was wrapped in a black plastic bag so that the accused could not have known what it contained. The learned deputy who responded to the appeal met this argument by citing the following remarks of Yong Pung How CJ in *Zulfikar bin Mustaffah v. PP* [2001] 1 SLR 633 with which we find ourselves in complete agreement:

> For the element of 'possession' (within the meaning of s. 17 of the Misuse of Drugs Act) to be established, it must not only be shown that the accused has physical control of the drugs at the relevant time; the prosecution must also prove that the accused possessed the requisite knowledge as to the contents of what he was carrying: see *Warner v. Metropolitan Police Commissioner* [1969] 2 AC 256; *Tan Ah Tee & Anor v. Public Prosecutor* [1978-1979] SLR 211; [1980] 1 MLJ 49. In the course of the appeal before us, counsel for the appellant relied heavily on the fact that the contents of the bundles were securely wrapped in newspapers and could not be identified. We were accordingly invited to draw the inference that the appellant had no knowledge of the contents of the bundles.

> We were unable to accede to this request. While the fact that the contents of the bundles were hidden from view may have been relevant in determining whether the requisite knowledge was absent, this factor should still not be given too much weight. Otherwise, drug peddlers could escape liability simply by ensuring that any drugs coming into their possession are first securely sealed in opaque wrappings. Rather, the court must appraise the entire facts of the case to see if the accused's claim to ignorance is credible.

8. The other point argued by learned counsel is that the facts admitted of other inferences so that the inference most favourable to the accused should be drawn. We have perused the record very carefully and find ourselves unable to accede to this submission. We begin by asking the question who is it who placed the packet in the accused's jeans? The reasonable inference is that it was the accused who did so. And learned counsel agrees that to be the case. That in itself points to an assertion by the accused of dominion over the packet and its contents. Next, there is the evidence of the accused leaving the restaurant. He was obviously headed somewhere. The only reasonable inference to be drawn from his act is that he did not have the drug with him for his personal use but that it was meant to be handed to some known or unknown person or persons. As Lord Diplock said in *Ong Ah Chuan v. Public Prosecutor* [1981] 1 MLJ 64:

> Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible explanation by him, be irresistible – even if there were no statutory presumption such as is contained in section 15 of the Drugs Act.

9. The third point that demolishes the accused's argument is that noted and relied upon by the learned judge, namely, the accused's reaction when PW4 identified himself as a police officer. To recall, the accused looked stunned or shocked. Learned counsel says that this is insufficient to bring home *mens rea* possession and relies on the following passage in the judgment of the Federal Court in *Public Prosecutor v. Tan Tatt Eek* [2005] 4 CLJ 460:

> To my mind the reaction of shock and the dropping of the bag exhibited by a person caught by surprise does not unequivocally show guilt. It could equally be the reaction of an innocent but surprised person. No firm inference can be drawn on the basis of such insufficient evident.

10. With respect to learned counsel, he has taken this isolated observation of the Federal Court out of its proper context. For in an earlier passage this is what the Federal Court said:

> In our view, the Court of Appeal was right in holding that there was no factual matrix adduced by the prosecution to infer that the respondent had knowledge of the nature of the drugs in the bag. On the evidence, the learned trial judge erred in finding that the respondent had knowledge of the drugs by way of inferences and from the circumstances of the case.
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> In this case, the respondent was seen and found to be carrying the orange plastic bag in his right hand and having dropped the bag he reacted with shock when he was arrested by the police. The learned trial judge held that the respondent had physical custody and control of the bag, and we see that he was right in coming to that conclusion. However, he went further to find by inference from the respondent's conduct and appearance that the respondent had knowledge of the drugs in the bag. To our minds, such a finding was not justified on the evidence before him.

As may be gathered from the above quoted passage, *Tan Tatt Eek* was a case whose facts were very different from the present case. There the accused was found carrying a plastic bag containing the proscribed drug. In that context, his expression of surprise was equally consistent with both a guilty as well as an innocent mind. Here, the drug was found tucked away in the front of the accused's jeans. None but he could have put them there. So, his demeanour when arrested is certainly a relevant and important circumstance that the judge was entitled to take into account.

12. We are entirely in agreement with counsel that the accused's reaction in itself would be insufficient to entitle a court to draw the inference of *mens rea* possession on his part. But we are here dealing with evidence of circumstances from which an inference is to be drawn. And as Thompson CJ said in *Chan Chwee Kong v. Public Prosecutor* [1962] MLJ 307:

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> [We] have listened to a careful, accurate and detailed analysis of the evidence against the appellant. That evidence was entirely circumstantial and what the criticism of it amounts to is this, that no single piece of that evidence is strong enough to sustain the convictions. That is very true. It must, however, be borne in mind that in cases like this where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner?

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13. So too here. It is the combined effect of all the surrounding circumstances that must be considered. Having addressed our minds to the cumulative force of the facts adduced by the prosecution, we are entirely satisfied that the learned judge was amply justified in holding that the accused had *mens rea* possession and that the case came within section 37(da) of the Act so that the accused was presumed to be a trafficker of the drug in question. The next issue is whether the accused had rebutted the presumption raised as aforesaid. The judge concluded that he had not. This is a fact sensitive area in which the views of the trial judge based as they are on the credibility of witnesses are entitled to great respect. An appellate court is always slow to disturb such findings of fact. See, *Andy bin Bagindah v. PP* [2000] 3 MLJ 644.

14. Before we conclude there is one matter that requires mention. It is not disputed that after the accused's arrest he was taken to a house where another person by the name of Murhaban who was also arrested. Murhaban was however released by the police and did not give evidence at the trial as he could not be located by that time. Nothing turns on these matters because it was never the accussed's defence that it was Murhaban who was the real trafficker. His case was that the real trafficker was Bob. And the learned judge having held that Bob did not exist sufficiently meets the requirements of the Radhi direction. See, *Mohamad Radhi bin Yaakob v. Public Prosecutor* [1991] 3 MLJ 169.

[10] It is thus clear that the Court of Appeal found that *mens rea* possession had been proved based on inferences drawn from proved facts and the circumstances of the case.

[11] The submission of learned counsel for the appellant in this court may be classified under the following:

(a) Failure of the Court of Appeal to follow its previous judgment in *Toh Su Kuan v. PP* [2005] 3 CLJ 740;

(b) Improper appreciation by the Court of Appeal of the law relating to conduct;

(c) Reliance by the Court of Appeal in the Privy Council case of *Ong Ah Chuan v. PP* [1981] 1 MLJ 64;

(d) Re-opening concession on facts made by learned counsel in the Court of Appeal.

[12] The issues itemised above will now be considered:

(a) Failure Of The Court Of Appeal To Follow Its Previous Judgment In Toh Su Kuan v. PP [2005] 3 CLJ 740;

[13] It was the submission of learned counsel, based on paras 3, 4 and 7 of the petition of appeal, that the Court of Appeal had erred in not holding that the prosecution had not proved *mens rea* possession of the drugs; had erred in not holding that there was no evidence of knowledge of the nature of the drugs by the appellant and had thereby misdirected itself in not following its previous decision in *Toh Su Kuan v. PP* [2005] 3 CLJ 740.

[14] This submission relates to the extent to which the Court of Appeal is bound by its previous decisions. This is answered by the celebrated English case of *Young v. Bristol Aeroplane Co Ltd* [1944] 1 KB 718 followed in a plethora of local cases. It is sufficient to refer to *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645 where Peh Swee Chin FCJ in writing for this court said at p 660:

> The doctrine of *stare decisis* or the rule of judicial precedent dictates that a court other than the highest court is obliged generally to follow the decisions of the courts at a higher or the same level in the court structure subject to certain exceptions affecting especially the Court of Appeal.
>
> The said exceptions are as decided in *Young v. Bristol Aeroplane Co Ltd* [1944] KB 718. The part of the decision in *Young v. Bristol Aeroplane* in regard to the said exceptions to the rule of judicial precedent ought to be accepted by us as part of the common law applicable by virtue of Civil Law Act 1956 *vide* its s. 3.

A To recap, the relevant *ratio decidendi* in *Young v. Bristol Aeroplane* is that there are three exceptions to the general rule that the Court of Appeal is bound by its own decisions or by decision of courts of co-ordinate jurisdiction such as the Court of Exchequer Chamber. The three exceptions are first, a decision of Court of B Appeal given *per incuriam* need not be followed; secondly, when faced with a conflict of past decisions of Court of Appeal, or a court of co-ordinate jurisdiction, it may choose which to follow irrespective of whether either of the conflicting decisions is an earlier case or a later one; thirdly it ought not to follow its own previous decision when it is expressly or by necessary implication, C overruled by the House of Lords, or it cannot stand with a decision of the House of Lords. There are of course further possible exceptions in addition to the three exceptions in *Young v. Bristol Aeroplane* when there may be cases the circumstances of which cry out for such new exceptions so long as they are not inconsistent with the three exceptions in *Young v. Bristol Aeroplane.* D

A few words need be said about a decision of Court of Appeal made *per incuriam* as mentioned above. The words *'per incuriam'* are to be interpreted narrowly to mean as per Sir Raymond Evershed MR in *Morelle v. Wakeling* [1955] 2 QB 379 at p 406 E as a 'decision given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding in the court concerned so that in such cases, some part of the decision or some step in the reasoning on which it is based, is found on that account to be demonstrably wrong'. It should be borne in mind that the year of *Morelle*'s case is 1955 whereas our s. 3 of F the Civil Law Act was enacted in 1956. The ratio in *Morelle*'s case is also part of the common law applicable to us.

In our local context, the Federal Court is to be substituted for the House of Lords with regard to the matter under discussion.

G **[15]** It is therefore beyond doubt that the Court of Appeal is bound by its previous decisions subject to the exceptions enumerated in the passage above.

[16] It is now necessary to identify the *ratio decidendi* of *Toh Su* H *Kuan v. PP* [2005] 3 CLJ 740 so as to consider its binding effect. As *Precedent in English Law,* 4th edn by Cross and Harris says at p 63:

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> According to Dr Goodhart the *ratio decidendi* of a case is determined by ascertaining the facts treated as material by the judge. It is the principle to be derived from the judge's decision on the basis of those facts. Any Court bound by the case must come to a similar conclusion unless there is a further fact in the case before it which it is prepared to treat as material, or unless some fact treated as material in the previous case is absent.

[17] In order to determine the *ratio decidendi* of *Toh Su Kuan v. PP* [2005] 3 CLJ 740 reference may be made to the relevant part of the judgment of Gopal Sri Ram JCA in that case where he said at pp 745-746;

> The learned judge quite rightly found there was no direct evidence of knowledge on the part of the appellant of the contents of the packets in question. Thus, at p 151 of the Appeal Record we find the learned judge saying this:
>
> > Di dalam kes ini, begitu juga dengan banyak kes-kes yang serupa, tidak ada keterangan secara langsung (direct evidence) yang tertuduh tahu bahawa benda yang dibawanya itu adalah dadah heroin. Oleh itu pihak pendakwa terpaksa bergantung semata-mata kepada keterangan mengikut keadaan bagi menunjukkan bahawa tertuduh mempunyai pengetahuan yang diperlukan.
>
> The learned judge then proceeded to draw together what he considered to be the threads of circumstantial evidence. He expressed the view that the manner in which the packets were concealed pointed to the appellant having knowledge that the packets contained heroin. In this we find a parallel in the learned judge's method of induction as that adopted by Mohd Hishamuddin J in *Public Prosecutor v. Msimanga Lesaly & Anor* [2000] 5 CLJ 261 where the learned judge says as follows:
>
> > I am satisfied that there is *prima facie* evidence that the first accused was found to be in possession of the heroin found in the slippers and on her body. The cunning manner in which the packages of heroin were concealed in her slippers and underneath her dress and tights indicates that she had knowledge of the heroin. Thus the presumption under section 37(da)(i) applies.
>
> With respect, we are unable to agree with the line of reasoning expressed by the learned judge. In our judgment, the manner in which the packets were fastened to the appellant's person shows at the highest that he had knowledge the packets contained some prohibited substance, perhaps, drugs or perhaps some other

A substance which was unlawful to have in one's possession. But it certainly does not prove that the appellant knew that the packets contained heroin, the drug which forms the subject matter of the charge.

B It follows from what we have said thus far that from the totality of the evidence led by the prosecution that the vital ingredient of *mens rea* possession required by s. 37 (da) (i) had not been established. On that ground alone the learned judge ought not to have called the appellant to enter upon his defence. And this is a case where the learned deputy took the position that this was C either a case of actual trafficking or no offence.

[18] Thus what has been said in the passage just referred to is that on the totality of the evidence adduced in the case *mens rea* possession had not been established. In particular it was held, on the facts of the case, that the manner in which the packets were D fastened to the appellant's person does not prove that he knew that they contained heroin; at the highest it only showed that he had knowledge that the packets contained some prohibited substance, perhaps, drugs or perhaps some other substance which was unlawful to have in one's possession. This in effect means E that it was held that knowledge can be proved only by direct evidence and not by way of drawing inferences from proved facts. It follows that the *ratio decidendi* of the case is that knowledge of the nature of the drugs possessed must be proved by direct evidence. F

[19] In order to appreciate the rationale of the *ratio decidendi* of *Toh Su Kuan v. PP* [2005] 3 CLJ 740 it is imperative to consider the law relating to the manner of proving knowledge. In *PP v. Chia Leong Foo* [2000] 6 MLJ 705 the High Court said at pp 718-G 721;

As most of the acts that constitute trafficking involve the prerequisite element of possession the initial matter that requires proof by the prosecution is possession. The ingredients necessary to establish possession have been considered in numerous cases. H I do not find it necessary to go into them in detail except for the element of *mens rea* that requires to be proved. In this regard Thomson J (as he then was) said in *Chan Pean Leon v. PP* [1956] MLJ 237 at p 239:

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Once possession is proved then before the accused person can be convicted it is necessary in addition to prove *mens rea*. And for this purpose as was pointed out by Gordon-Smith Ag CJ in the case of *Toh Ah Lam and Mak Thim v. Rex* [1949] MLJ 54, it is necessary to prove that the person in possession knows the nature of the thing possessed.

If the thing, as in *Toh*'s case, is in a box which itself is in the possession of the accused it must be proved that he knew what was in the box. If, as in *Lee Boon Gan v. R* [1954] MLJ 103, it was a lottery document it must be proved that he knew it was a lottery document. Here again knowledge cannot be proved by direct evidence, it can only be proved by inference from the surrounding circumstances. Again the possible variety of circumstances which will support such an inference is infinite. There may be something in the accused's behaviour that shows knowledge, or the nature of the thing may be so obvious that it is possible to say 'he must have known what it was' or, again in cases under the Dangerous Drugs Ordinance, there may be a statutory presumption which fills a gap in the evidence.'

As Lim Beng Choon J said in *PP v. Badrulsham bin Baharom* [1988] 2 MLJ 585 at p 589:

> Knowledge being an element of the state of mind of a person, the obvious question is: how is one to prove the element of knowledge in order to establish possession. However that may be, certain modes of proof are acceptable as sufficient to distinguish between a genuine and a feigned defence. Those modes of proof are acceptable because unless a defendant confesses that he has the necessary knowledge which is an element of his state of mind such element must be judged from his outward acts or omissions.

As I said in *PP v. Hoo Chee Keong* [1997] 4 MLJ 451 at p 459:

> Proof of knowledge is very often a matter of inference.

Thean J (as he then was) in elaborating on the matter of inferring knowledge said in *PP v. Phua Keng Tong* [1986] 2 MLJ 279 at p 286:

However, in this case, like in many others, proof of knowledge or belief on the part of an accused is a matter of inference from facts. In the case of *RCA Corp v. Custom Cleared Sales Pty Ltd* [1978] FSR 576; 19 ALR 123, the Court of Appeal in New South Wales in dealing with the question of knowledge of infringement of copyright said at p 478:

> Except where a party's own statements or gestures are relied upon, proof of knowledge is always a matter of inference, and the material from which the inference of the existence of actual knowledge can be inferred varies infinitely from case to case.

And the court further said, at p 579:

> It seems to us that the principle is more acurately put by saying that a court is entitled to infer knowledge on the part of a particular person on the assumption that such a person has the ordinary understanding expected of persons in his line of business, unless by his or other evidence it is convinced otherwise. In other words, the true position is that the court is not concerned with the knowledge of a reasonable man but is concerned with reasonable inferences to be drawn from a concrete situation as disclosed in the evidence as it affects the particular person whose knowledge is in issue. In inferring knowledge, a court is entitled to approach the matter in two stages; where opportunities for knowledge on the part of the particular person are proved and there is nothing to indicate that there are obstacles to the particular person acquiring the relevant knowledge, there is some evidence from which the court can conclude that such person has knowledge.

It is therefore clear that knowledge can be proved by drawing inferences from surrounding circumstances. I shall refer to two cases to illustrate proof of knowledge by the drawing of inferences. The first is *Director of Public Prosecutions v. Wishart Brooks* [1974] AC 862. In that case a number of police officers saw a van with its engine running parked on a lay-by near an airstrip.

On the approach by the police officers, the respondent, who was the driver, and others who were in the cab of the van attempted to run away. The respondent was caught by the police. In the body of the van, which was neither visible nor accessible from the cab, were 19 sacks containing over 1,000 pounds of ganja. The respondent's conviction was quashed by the Jamaican Court of Appeal on the ground that it was not shown that he had more than mere custody or charge of the van and its contents and that there was no evidence that he had possession of the ganja. The Privy Council, in allowing the appeal, held that the technical doctrines of the civil law about possession were irrelevant to this field of criminal law and added at pp 866-867:

> In the ordinary use of the word 'possession', one has in one's possession whatever is, to one's own knowledge, physically in one's custody or under one's physical control. This is obviously what was intended to be prohibited in the case of dangerous drugs. Question (1) and the reason given for the answer, however, suggest that, in addition to the mental element of knowledge on the part of the accused, which the Court of Appeal had chosen to deal with separately in questions (2) and (3), the word 'possession' imported into this criminal statute as a necessary ingredient of an offence against public health the highly technical doctrines of the civil law about physical custody without ownership as a source of legal rights in the actual custodian against third parties and about the legal relationships between owner and custodian which bring about the separation of propriety and possessory rights in chattels. If this is the implication to be drawn from this part of the judgment in *Reg v. Livingston* [1952] 6 JLR 95 it is, in their Lordship's view, wrong. These technical doctrines of the civil law about possession are irrelevant to this field of criminal law. The only *actus reus* required to constitute an offence under s. 7(c) is that the dangerous drug should be physically in the custody or under the control of the accused. The *mens rea* by which the *actus reus* must be accompanied is the kind of knowledge on the part of the accused that is postulated in questions (2) and (3).

> Upon the evidence, including his own statement to the police, the 19 sacks of ganja were clearly in the physical custody of the respondent and under his physical control. The only remaining issue was whether the inference should be drawn that the respondent knew that his load consisted of ganja. Upon all the evidence and in particular the fact that he and other occupants of the van attempted to run away as soon as they saw the uniformed police approaching the magistrate was, in their Lordships' view, fully entitled to draw the inference that the defendant knew what he was carrying in the van.

The second case is *Neo Koon Cheo v. R* [1959] MLJ 47. In that case a raid was made by a detective sergeant, a detective corporal and a detective on the attic of No 26, New Bridge Road, on 21 January 1958 at about 8.20pm. On entering the attic, the detective corporal and the detective saw the appellant holding a confectionery tin in his hands and attempting to get out of the attic through an opening on the left side of the attic. On examination the tin was found to contain a phial of chandu, a small tin of chandu dross, an opium pipehead, a rag and some tools. In holding, in the alternative, that the evidence was sufficient to make out a case against the appellant for possession of prepared opium and smoking utensils Ambrose J said at p 50:

> If my interpretation of s. 37(d) of the Ordinance is not correct, the conviction on the first charge can be supported without having recourse to the presumption under s. 37(d). The fact that the appellant was seen attempting to take the confectionery tin and its contents out of the attic as soon as the detectives entered the attic raises the inference that the appellant was endeavouring to put the tin and its contents out of sight and the further inference that he had knowledge of the nature of the contents of the tin. As the opium pipe-head and the chandu and chandu dross were found in the attic it must be presumed, until the contrary is proved, under s. 37(c) of the Dangerous Drugs Ordinance that the attic was used for the purpose of smoking of chandu by a human being and that the occupier permitted the attic to be used for such purpose. The appellant was not the occupier of the premises but a friend of the occupier.

> Nevertheless the presumption under s. 37(c) makes both the inferences irresistible. As the contents of the confectionery tin were in the appellant's actual physical control, and as the circumstances justified the inference that the appellant intended to exercise control over them for his own purposes, he was, in my opinion, rightly found to be in possession of the chandu and chandu dross.

[20] In *Emmanuel Yaw Teiku v. PP* [2006] 3 CLJ 597 Richard Malanjum FCJ (as he then was) said at pp 605-606:

> It should be borne in mind that proof of intention or knowledge is generally inferred from proved facts and circumstances. It is difficult to do so by other means unless there is a clear admission by the person himself. This difficulty had been acknowledged in the case of *Chan Pean Leon v. PP* [1956] MLJ 237 when Thomson J said this (at p 239):
>
> > Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case.
>
> (See also *Wong Nam Loi v. PP* [1998] 1 CLJ 37).

[21] In *Wong Nam Loi v. PP* [1998] 1 CLJ 37 Shaik Daud JCA said at p 40:

> In most cases, knowledge cannot be adduced by direct or tangible evidence but only by inference from the surrounding circumstances.

[22] In *Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381 the packets containing the drugs were swallowed by the accused persons and were found in their stomachs. Gopal Sri Ram JCA in writing for this court said at p 388:

> The totality of the evidence reasonably supports the conclusion that the appellants were in actual possession of the proscribed drug at the time of their initial detention.

[23] The passage referred to above deals with knowledge having been established based on inferences drawn from proved facts and not direct evidence.

[24] In the recent judgment of this court in *PP v. Abdul Rahman bin Akif* [2007] 4 CLJ 337, Arifin Zakaria FCJ in dealing with the manner of proving knowledge said at pp 351-353:

> [19] The issue of knowledge necessary to establish possession came to be considered by the English House of Lords in the case of *Warner v. Metropolitan Police Commissioner* [1968] 2 All ER 356, which was considered and relied upon by the Singapore Court of Appeal in *Zulfikar bin Mustaffah v. Public Prosecutor* [2001] 1 SLR 633. In Warner the following question was posed to their Lordships:
>
> > Whether for the purpose of s. 1 of the Drugs (Prevention of Misuse) Act 1964, a defendant is deemed to be in possession of a prohibited substance when to his knowledge he is in physical possession of the substance but is unaware of its true nature.
>
> [20] At p 367 Lord Reid addressed the issue as follows:
>
> > The object of this legislation is to penalize possession of certain drugs. So if *mens rea* has not been excluded what would be required would be the knowledge of the accused that he had prohibited drugs in his possession. It would be no defence, though it would be a mitigation, that he did not intend that they should be used improperly. And it is commonplace that, if the accused had a suspicion but deliberately shut his eyes, the court or jury is well entitled to hold him guilty. Further, it would be pedantic to hold that it must be shown that the accused knew precisely which drug he had in his possession. Ignorance of the law is no defence and in fact virtually everyone knows that there are prohibited drugs. So it would be quite sufficient to prove facts from which it could properly be inferred that the accused knew that he had a prohibited drug in his possession. That would not lead to an unreasonable result.
>
> [21] In the same case Lord Morris answered the question in the following manner:
>
> > If there is assent to the control of a thing, either after having the means of knowledge of what the thing is or contains or being unmindful whether there are means of knowledge or not, then ordinarily there will be possession. If there is some momentary custody of a thing without any knowledge or means of knowledge of what the thing is or contains then, ordinarily, I would suppose that there would not be possession. If, however, someone deliberately

> assumes control of some package or container, then I would think that he is in possession of it. If he deliberately so assumes control knowing that it has contents, he would also be in possession of the contents. I cannot think that it would be rational to hold that someone who is in possession of a box which he knows to have things in it is in possession of the box but not in possession of the things in it. If he had been misinformed or misled as to the nature of the contents, or if he had made a wrong surmise as to them, it seems to me that he would nevertheless be in possession of them.

[22] Reverting to the present case, it is therefore incumbent upon the court to scrutinize the entire evidence before the court to see whether an inference can be drawn against the respondent that he knew about the drug in the three packages found in the car. It is not in dispute that the three packages were found hidden in the car under the driver's seat and under the front passenger's seat. He was alone in the car at the material time. One other important factor of relevance is that the car had been in his possession for the past seven months prior to his arrest.

[23] It is true that the trial judge did not make any finding on the issue of knowledge necessary to establish possession of the drugs, as he relied on the cautioned statement in coming to his finding. The Court of Appeal on the facts correctly found that there was sufficient evidence to find the respondent to be in custody and control of the three packages found in the car and relying on the presumption under s. 37(d) of the Act the Court of Appeal went on to hold that the respondent was in presumed possession of the drug.

[24] Applying the observations set out in the authorities cited above to the facts in the present case, the irresistible inference that may be drawn in the circumstances is that the respondent all along knew about the drug found in the car.

The fact that they were found hidden under the seats of the car and wrapped in Chinese newspaper would not assist him to negate such an inference. From the evidence of PW5 it is clear that little effort was required to uncover what was contained in the three packages. Therefore, we are of the view that on the facts and in the circumstances of this case the learned trial judge, properly directed on the law, would have come to the finding that *prima facie* the respondent had possession of the drug independent of the statutory presumption under s. 37(d) of the Act.

[25] The law is clear and well settled. Proof of knowledge is very often a matter of inference. The material from which the inference of knowledge can be drawn varies from case to case. It would be sufficient for the prosecution to prove facts from which it could properly be inferred that the accused had the necessary knowledge. The *ratio decidendi* of *Toh Su Kuan v. PP* [2005] 3 CLJ 740 is thus inconsistent with settled legal principles. In particular it conflicts with the correct statement of the law in the Court of Appeal case of *Wong Nam Loi v. PP* [1998] 1 CLJ 37 and the application of the principles in the judgment of this court in *Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381. The Court of Appeal is therefore justified in this case in disregarding *Toh Su Kuan v. PP* [2005] 3 CLJ 740 as the rule of precedent allows it to choose which of its past conflicting decisions it will follow. As a matter of fact the case ought not to be followed as it cannot stand with the judgment of this Court in *Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381. In any event this court is not concerned with the judgment in *Toh Su Kuan v. PP* [2005] 3 CLJ 740 as it is *per incuriam*. The submission advanced by the appellant is therefore without any merit.

(b) Improper Appreciation By The Court Of Appeal Of The Law Relating To Conduct;

[26] The Court of Appeal held that the conduct of the appellant in being stunned or shocked when PW4 identified himself to him as a police officer was certainly relevant when judged against the circumstances of the case. However, the court agreed that the reaction of the appellant in itself would be insufficient to draw the inference of *mens rea* possession. In his submission learned counsel argued that the conduct of the appellant should not be held against him as even an innocent man can be shocked or stunned in such circumstances. In support of his argument he referred to *Abdullah Zawawi Yusoff v. PP* [1993] 4 CLJ 1 where Edgar Joseph Jr SCJ said at p 6:

> We now come to what does seem to us to be evidence of a potent kind against the appellant, namely his conduct in taking to his heels upon Inspector Mat Yusoff announcing the discovery of the drugs in the box. This conduct of the appellant was consistent with his having known of the presence of the drugs in the box before their discovery, indicating thereby a sense of guilt.

On the other hand, it was conduct equally consistent with the appellant having been in a state of pure panic, bearing in mind that it was only after Inspector Mat Yusoff announced the discovery of the drugs that the appellant took to his heels. An innocent man faced with the prospect of arrest on a capital charge might foolishly react in that way. It is true that the appellant himself denied running away but we agree with the judge that the appellant lied on this point, but this does not preclude us from drawing such inferences as may be justified from the evidence adduced by the prosecution. The Jamaican Privy Council case of *DPP v. Brooks* [1974] 2 All ER 840, cited to us by the learned deputy public prosecutor, where the accused, who occupied the driver's seat of a stationary van which contained more than 1000 lbs of ganja, together with several others in the van, scrambled out and ran off, when police officers hurried towards the van, is therefore, readily distinguishable.

[27] This passage raises for consideration the circumstances in which evidence of conduct is admissible and when it is not.

[28] Evidence of conduct is admissible under s. 8 of the Evidence Act 1950 ("s. 8") which reads as follows:

(1) Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

(2) The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

[29] Illustration (i) to s. 8 reads as follows:

A is accused of a crime.

The facts that after the commission of the alleged crime he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it are relevant.

[30] In commenting on the admissibility of evidence of conduct under s. 8 *Sarkar on Evidence* 15th edn says at p. 175:

> The conduct of party to a proceeding or his agent in reference to such proceeding at the time when the facts occurred out of which the proceeding arises, or in reference to any fact in issue or relevant fact, or the conduct of the complainant, is relevant; but the condition precedent to its admissibility as 'conduct' is that it must directly influence or be influenced by a fact in issue or relevant fact and such conduct does not include action resulting from other causes or circumstances. It must be the essential complement of the act done or refused to be done. Conduct includes antecedent or subsequent conduct involving both actions and statements.

And at p 194:

> What is meant by the words, if such conduct influences or is influenced by any fact in issue or relevant fact, is that there must be a direct or immediate relation between the conduct and the fact in issue. Conduct which is brought about by some other agency though connected with the facts in issue is not relevant conduct.

[31] The effect of evidence that complies with the requirements of s. 8 and when it does not can be seen in the case of *Kuldip Sharma v. The State* [1996] Cri LJ 244 where JB Goel J said at pp 250-251:

> The occurrence had taken place sometime during night of 1st or 2nd 1985. The accused was found absent from his house next morning. He was absconding after the occurrence. Learned counsel for the appellant has contended that the mere fact of absconding or having been last seen together, is not incriminating circumstance justifying conviction. For this, he has relied on *State of Rajasthan v. Smt. Kamala*, AIR [1991] SC 967, *Inderjit Singh v. State of Punjab*, AIR [1991] SC 1674, *Satish Kumar v. State*, [1994] (IV) CCR 2579 (DB) (Bombay) and *Lakhanpal v. State of Madhya Pradesh*, [1979] Cr LJ 1217 (SC). In these cases, except the evidence of last seen together or absconding, no other circumstantial evidence was proved or found reliable and trustworthy to form a chain of circumstances complete enough to base conviction. The conduct of the accused soon after the incident plays an important part in the determination of the guilt and is a corroborative piece of evidence. Disappearance of the accused after the occurrence is a relevant circumstance which in the absence of any plausible explanation, could be taken into consideration against him as conduct under Section 8 of the Indian Evidence Act. In the present case, firstly, there is no material on the record to show why the deceased would have committed suicide. The accused was present at the time of the concurrence

and if it was a case of suicide, there is no material brought on the record to show that the accused had taken any steps either to prevent her from so doing or get her medical aid immediately. As a normal human conduct on the death of a near kith and kin, one laments and would raise hue and cry and even take assistance and counsel from the neighbours and the accused had cordial relations with his immediate neighbours. Instead of doing so, he had slipped away and remained absconding for several days. This conduct certainly destroys presumption of innocence on his part.

[32] Evidence of conduct admissible under s. 8 may be explained as provided in s. 9 of the Evidence Act 1950 ("s. 9") which reads as follows:

Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened or which show the relation of parties by whom any such fact was transacted, are relevant so far as they are necessary for that purpose.

[33] Illustration (c) to s. 9 reads as follows:

A is accused of a crime.

The fact that soon after the commission of the crime A absconded from his house is relevant under section 8 as conduct subsequent to and affected by facts in issue.

The fact that at the time when he left home he had sudden and urgent business at the place to which he went is relevant as tending to explain the fact that he left home suddenly.

The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent.

[34] In commenting on s. 9 *Sarkar on Evidence* 15th edn says at p 204:

S. 9 deals with facts necessary to explain or introduce relevant facts. Such facts are not of a causative nature, nor can they be strictly said to form part of the same transaction. Facts which explain or introduce a fact in issue though relevant for the purpose stated in the section, such facts do not form part of the

A *res gestae* (*ante*, s. 6) as they do not accompany the facts or transaction in issue. Facts which are explanatory or introductory of a relevant fact are often of considerable help in understanding the real nature of a transaction, in supplying missing links, in leading up to the main fact, or in establishing some connexion throwing light on the fact in issue.

B

[35] The applicability of the two sections was considered in *PP v. Chia Leong Foo* [2000] 6 MLJ 705 where the High Court said at pp 721-722:

C I must add that evidence of conduct which allows inferences to be drawn, as in the two cases referred to, is admissible under s. 8 of the Evidence Act 1950. A typical example of such conduct is the absconding or flight of a person after the commission of an offence. But evidence of mere absconding or flight is not such a vital circumstance which can be considered to show that the D absconder was having any guilty mind (see *Bhagat Bahadur v. State* [1996] Cri LJ 2201). Such conduct must be considered in the totality of the evidence adduced (see *Mansor bin Mohd Rashid*'s case).

E For it to be capable of amounting to an admission of guilt there must be a nexus between his conduct, his flight and the offence in question. As Lord Ackner said in *Chan Kwok Keung & Anor v. The Queen* [1990] 1 CLJ 411 at p 413:

> F It is common ground that conduct, and in particular the flight of an accused after an offence has been committed, may be tantamount to an admission by him of his guilt of that offence and as such admissible evidence. Their Lordships' attention was invited by Mr Duckett QC on behalf of the crown to a number of Australian authorities which illustrate this proposition. But each case must depend G on its own particular facts. In those cases to which their Lordships were referred, the flight of the accused had occurred within a short space of time of the offence being committed and in circumstances which clearly connected the accused with the offence.
>
> H In this case the appellants were found stowed away nearly ten months after the commission of the crime. The prosecution led no evidence to suggest that they had been in hiding for all or any part of this period. Indeed there was no evidence as to whether any and if so what efforts had I been made by the police to find them and with what result. Leung, in his statement to the police after his arrest, gave

them some information as to where the appellants were living or working, but no evidence was given as to whether these leads were followed up and if so with what result. It would in their Lordships' opinion be quite wrong for the jury to have taken it for granted that the appellants, during all or any part of this relatively lengthy period, had been evading capture for this offence. That was not the case as presented by the prosecution, and very appropriately the judge in his summing-up never suggested to the jury that they were entitled to make such an assumption.

In order for flight to be capable of amounting to an admission of guilt there must be some evidence which establishes a nexus between the conduct of the accused, his flight or concealment and the offence in question. In this case the prosecution produced no evidence to establish that either of the appellants had been hiding away or otherwise behaving in an unusual manner in this period of nearly ten months. There was therefore no material which could have justified the jury inferring that the only reasonable explanation for the appellants stowing away on the ship from Hong Kong to Macau was that they were on the run, because they knew they might be arrested and charged with this murder. There could have been a variety of other reasons for their having stowed away nearly ten months after the murder.

Evidence of such conduct can be explained away by the accused as provided by s. 9 of the Evidence Act 1950 (see *Ling Ngan Liong v. PP* [1964] MLJ 20; *Choo Chang Teik & Anor v. PP* [1991] 3 MLJ 423). However, the onus is on the accused to explain his conduct. Thus in *Mansor bin Mohd Rashid*'s case, the Federal Court held that the intention of the accused persons to flee, when considered in the light of the evidence adduced, justifiably necessitated some explanation from them. A failure to put forward any explanation of absconding after the occurrence of a crime is a point in favour of the prosecution (see *Parmeshwar v. R* AIR [1941] Orissa 517).

[36] The law relating to evidence of conduct is thus patent. If there is no evidence to show that the conduct is influenced by any fact in issue or relevant fact as required by s. 8 then it is not admissible as it would then be an equivocal act justifying inferences favourable to the accused being drawn. If it satisfies the requirement of s. 8 it is admissible. It must be observed that the degree of proof required to establish evidence of conduct would

depend on the nature of the conduct. Conduct like the flight of an accused is a more positive act and is easily established. On the other hand conduct like the accused looking stunned, nervous, scared or frightened is very often a matter of perception and more detailed evidence may be required. Once admitted the court cannot resort to any other explanation for the conduct or draw inferences on its own accord to render it inadmissible. The onus is on the accused to explain his conduct pursuant to s. 9. Such explanation must not be in their barest possible form, but with a reasonable fullness of detail and circumstance (see *R v. Stephenson* [1904] 68 JP 524). The onus may be discharged even in the course of the case for the prosecution, for example, by way of cross-examination of relevant witnesses. If not so done it can be discharged only at the defence stage. However, the evidence admissible under the section must be confined to what is necessary for the purposes enumerated. Illustration (c) to s. 9 explains the operation of this principle. It provides that when A is accused of a crime the fact that soon after the commission of the crime he absconded from his house is relevant. But the fact that at the time when he left home he had sudden and urgent business at the place to which he went, is relevant, as tending to explain the fact that he left home suddenly. The details of the business on which he left, however, are not relevant, except in so far as they are necessary to show that the business was sudden and urgent. If the explanation is accepted by the court then the inference arising from the conduct is rebutted. If it is not accepted or if the accused does not explain his conduct the inference remains unrebutted.

[37] It is now appropriate to consider the rationale of the court in explaining the conduct of the accused in running away in *Abdullah Zawawi Yusoff v. PP* [1993] 4 CLJ 1 which formed the basis of the submission of the appellant. In that case the drugs were found in a house occupied by the accused, his wife and a third person. The court considered the evidence of possible access to the house by others, and in distinguishing the case from *DPP v. Brooks* [1974] 2 All ER 840, held that the conduct of the accused in running away was equally consistent with him having been in a state of pure panic even though he did not offer any explanation himself. On the other hand in *DPP v. Brooks* [1974] 2 All ER 840 the accused was in the driver's seat of a stationary van with several others. There were drugs in the van. When the

police approached the van all of them ran. The conduct of the accused in running away was held against him. The difference in both the cases is that in *Abdullah Zawawi Yusoff v. PP* [1993] 4 CLJ 1 there was no evidence to show that the act of the accused in running away was influenced by any fact in issue or relevant fact within the meaning of s. 8 in view of the possibility of access to the house by others. It is therefore not admissible on this ground as it is equivocal thereby justifying an inference in favour of the accused being drawn and ought to have been so ruled at an earlier stage of the trial. The case of *Abdullah Zawawi Yusoff v. PP* [1993] 4 CLJ 1 is therefore authority only to this extent. On the other hand in *DPP v. Brooks* [1974] 2 All ER 840 there was evidence to show that the drugs were in the physical custody and control of the accused and his conduct of running away thus comes, in the Malaysian context, within the meaning of s. 8. It is therefore admissible and cannot be explained away by the court itself by offering an explanation which is consistent with the innocence of the accused. The explanation must be offered by the accused himself as required by s. 9.

[38] In this case the reaction of the appellant in looking stunned or shocked upon being approached by the police is clearly admissible under s. 8 since it has a direct bearing on the fact in issue as the drugs found were tucked away in the front of the jeans worn by him. The explanation for his reaction must therefore be offered by he himself as required by s. 9. The court cannot, on its own, offer an explanation for his reaction. However, in his defence the appellant did not offer any explanation at all for his reaction upon being approached by the police. It can therefore be validly used as evidence against him. The inference to be drawn from the evidence of conduct of the appellant against the background of the other evidence is that he knew what he was carrying (see *DPP v. Brooks* [1974] 2 All ER 840). It follows that the stand taken by the appellant in relation to the evidence of conduct is not sustainable. Be that as it may, the evidence of conduct in this case is not very significant in view of the manner in which the appellant carried the drugs on his person from which it can reasonably be inferred that he had knowledge of the drugs in his possession (see the cases referred to earlier, and, in particular, *Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381 and *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337).

(c) Reliance By The Court of Appeal In The Privy Council Case Of Ong Ah Chuan v. PP [1981] 1 MLJ 64.

[39] It was contended by the learned counsel in para 10 of the Petition of Appeal that the Court of Appeal had erred in relying on the case of *Ong Ah Chuan v. PP* [1981] 1 MLJ 64 as it is clearly distinguishable. The Court of Appeal had referred to that part of the judgment in that case where Lord Diplock said at p 69:

> Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible explanation by him, be irresistible – even if there were no statutory presumption such as is contained in section 15 of the Drugs Act.

[40] It must be observed that the passage reproduced must be read against the defence set up by the accused in that case, that is to say, the drugs were meant for his own consumption. A similar inference will be justified even in the case of possession of drugs in our laws where personal consumption is also a defence.

[41] However, that was not the purpose for which the passage was reproduced by the Court of Appeal. Gopal Sri Ram JCA did so to support his statement that:

> Next, there is the evidence of the accused leaving the restaurant. He was obviously headed somewhere. The only reasonable inference to be drawn from his act is that he did not have the drug with him for his personal use but that it was meant to be handed to some known or unknown person or persons.

[42] The passage reproduced from *Ong Ah Chuan v. PP* [1981] 1 MLJ 64 clearly does not support the purpose for which it was cited. It had merely stated that the inference is that the drugs were being transported for the purpose of trafficking in them. It did not say that the drugs were being transported for the purpose of being handed to someone. Such an interpretation of the passage cannot be supported. This is for the obvious reason that transporting drugs for the purpose of being handed to someone is

only one of the acts that constitutes trafficking. Gopal Sri Ram JCA interpreted the passage from *Ong Ah Chuan v. PP* [1981] 1 MLJ 64 correctly in *PP v. Karim AB Jabar* [2008] 5 CLJ 173 where he said at p 177:

> In the present appeal the respondent was found conveying the proscribed drugs in the motorcar in question. The quantity of the drugs discovered was far in excess of that he would require for his personal use, if any. The irresistible inference that the learned trial judge ought to have drawn from the totality of evidence was that the respondent was conveying the drugs for the purpose of trafficking in it.

[43] Be that as it may, the statement by the Court of Appeal in reliance on *Ong Ah Chuan v. PP* [1981] 1 MLJ 64 in this case is not relevant and does not merit serious consideration as the court agreed with the learned trial judge in drawing the statutory presumption of trafficking under s. 37(da) of the Act. The submission of the appellant cannot therefore withstand serious scrutiny.

(d) Re-opening Concession On Facts Made By Learned Counsel In The Court Of Appeal

[44] During the hearing of the appeal in the Court of Appeal learned counsel who then appeared for the defence accepted the findings of fact made by the High Court. Before us learned counsel wanted to re-open the concession on facts made in the Court of Appeal and in support of his argument referred to the judgment of this court in *Chow Kok Keong v. PP* [1998] 2 CLJ 469 where Edgar Joseph Jr FCJ said at p. 483:

> But, as we have already indicated, Mr Karpal Singh who argues this appeal with commendable propriety and restraint, did not take this position but was content to concede that at the close of the case for the prosecution it had been proved by affirmative evidence that the Appellant had been 'found in possession' of the drugs, and that the presumption of trafficking under s. 37(da) of the Act had been correctly invoked by the Judge, though for the wrong reason. (See the Judgment of this Court in *Muhammed bin Hassan v. PP* [1998] 2 CLJ 170 where it was held that it is not permissible to pile the presumption of trafficking under s. 37(da) upon the presumption of possession under s. 37(d) of the Act.) Mr Karpal Singh therefore confined his contention to arguing that the presumption of trafficking under s. 37(da) had been rebutted

A but conceded that because the Appellant was in passive possession of the drugs, this was an appropriate case for this Court to substitute a conviction for possession in contravention of s. 6 and punishable under s. 39A(2) of the Act.

B Now, it is undoubtedly the law, that in a criminal case, we are in no way bound to act on a concession of the sort made by Mr Karpal Singh in this case but, that we can do so, in an appropriate case, we have no doubt. In this context, we need no more than refer to the numerous instances, when in appeals against conviction for the offence of trafficking in dangerous drugs C in contravention of s. 39B of the Act, the prosecution had conceded that the conviction could not stand, but that a conviction for some lesser offence, such as, for possession under s. 6 or even s. 12 of the Act, be substituted, and upon the defence agreeing to such a course, we had invariably, acted on the concession without query, and substituted a conviction for such D lesser offence.

[45] It cannot be disputed that a concession of the nature made in this case can be re-opened for further argument.

E **[46]** The salient aspect of this part of the submission of learned counsel relates to the significance of Bob and Murhaban bin Umar. He argued that as Murhaban bin Umar was also arrested a statement under s. 112 of the Criminal Procedure Code ought to have been recorded from him. As he opened the door of the F house when the police arrived there he would be in a position to confirm whether Bob was also arrested. As such, learned counsel said, he ought to have been called as a witness by the prosecution or, at least should have been made available to the defence. It was also argued that in any event the defence ought G to have been granted an adjournment so that Murhaban bin Umar could have been called as a witness. With regard to Bob it was contended that PW6 had said that an Indian man was arrested together with the appellant. As it was the defence case that Bob had placed the drugs on the chair he was an important witness.

H **[47]** The learned judge had undertaken a careful and meticulous analysis of the evidence adduced. She had referred to the evidence of PW4, PW5 and PW7 who confirmed the version of events relied on by the prosecution. They did not agree that Bob was present at the scene and that the appellant was arrested as I claimed by the defence. They also denied that Murhaban bin Umar opened the door of the appellant's house when the police arrived

there. The learned judge rejected the evidence of PW6 that an Indian man was arrested together with the appellant as he did not have direct knowledge of the fact. With regard to Bob and Murhaban bin Umar the learned judge said in her grounds of judgment at pp 344 to 347 of the appeal record:

> Dalam pembelaannya yang merupakan keterangan yang diberikan secara bersumpah, tertuduh telah menafikan bahawa dadah cannabis tersebut telah dijumpai oleh SP4 daripada badannya. Seterusnya tertuduh telah memberi keterangan secara panjang lebar bahawa barang kes itu telah dibawa oleh seorang lelaki India yang beliau kenali sebagai Bob dan diletakkan diatas kerusi disebelahnya. Bob telah duduk semeja dengan tertuduh ketika tertuduh sedang makan.
>
> Menurut tertuduh, SP4 dan ahli-ahli pasukan serbuan telah menangkap tertuduh dan Bob dan membawa mereka ke rumah tertuduh di Taman Pelangi. Ketika itu kawan tertuduh yang bernama Murhaban bin Umar ada di dalam rumah.
>
> Malangnya Murhaban bin Umar yang telah hadir di mahkamah pada peringkat kes pihak pendakwaan telah tidak menghadirkan diri di mahkamah untuk memberi keterangan untuk menyokong cerita tertuduh walaupun mahkamah telah menangguhkan sambungan perbicaraan kes sekali untuk membolehkan pihak pembelaan cuba mengesannya dan membawanya ke Malaysia untuk memberi keterangan pada peringkat pembelaan. Pada pendapat mahkamah, keterangan tertuduh bahawa Murhaban bin Umar berada di dalam rumah tertuduh ketika pasukan serbuan membawa tertuduh dan Bob ke rumahnya di Taman Pelangi adalah tidak munasabah. Sebabnya ialah sekiranya pada tarikh kejadian Murhaban bin Umar berada dalam rumah, mengapa tertuduh tidak mengajak Murhaban bin Umar keluar untuk makan bersama-samanya di kedai makan tersebut. Pada pendapat mahkamah, alasan yang diberikan oleh tertuduh bahawa Murhaban bin Umar sedang tidur ketika itu adalah satu yang direka oleh tertuduh kerana tertuduh boleh mengejutkan Marhaban bin Umar dari tidur memandangkan cerita tertuduh ialah bahawa Murhaban bin Umar yang sudah lama ingin berjumpa dengan tertuduh telah datang ke Malaysia untuk tujuan berjumpa dengan tertuduh. Cerita tertuduh juga ialah bahawa beliau tidak pergi bekerja pada tarikh kejadian kerana hendak berjumpa dengan Murhaban bin Umar. Akan tetapi tertuduh telah berkata pada waktu pagi tertuduh bersarapan dengan 3 orang kawan yang lain kerana Murhaban bin Umar masih tidur. Pada waktu tengahari tertuduh juga tidak makan bersama dengan Murhaban bin Umar kerana Murhaban sedang tidur.

Oleh itu walaupun pihak pembelaan telah menunjukkan bahawa Murhaban bin Umar wujud dan adalah bukan satu rekaan dengan memanggilnya untuk maksud pengecaman oleh pasukan serbuan pada peringkat kes pihak pendakwaan mahkamah tidak mempercayai keterangan tertuduh bahawa beliau ada dalam rumah tertuduh dan telah nampak pasukan serbuan membawa tertuduh dan Bob dalam keadaan bergari semasa tertuduh dibawa oleh pasukan polis ke rumahnya selepas tertuduh ditangkap.

Pada pendapat mahkamah, watak Bob tidak wujud sama sekali dan adalah hanya satu rekaan yang sengaja diadakan oleh pihak pembelaan. Pada pendapat mahkamah, tidak ada sebab mengapa SP4 dan ahli-ahli pasukan serbuannya ingin menganiaya tertuduh dalam kes ini dengan menokok tambah keterangan mereka di mahkamah. Lebih-lebih lagi kes ini merupakan satu kes pengedaran dadah dimana hukuman yang diperuntukkan ialah satu sahaja hukuman iaitu gantung sehingga mati. Walaupun tertuduh kata watak Bob wujud dan beliau mengenali Bob selama setahun sebelum kejadian berlaku, beliau tidak tahu nama penuh Bob. Beliau juga tidak tahu nombor pendaftaran van yang dipandu oleh Bob selama setahun tertuduh menaiki van tersebut untuk pergi ke tempat kerjanya.

Tambahannya, semasa memberi keterangan di mahkamah, tertuduh telah berkata apabila polis tanya dia semasa di kedai makan tersebut beg plastik hitam yang diletakkan di atas kerusi adalah kepunyaan siapa, tertuduh telah menjawab "barang itu kepunyaan India". Akan tetapi pasukan serbuan tidak pernah disoal balas tentang perkara ini dan perkara ini juga tidak pernah dicadangkan kepada pasukan serbuan yang telah memberi keterangan semasa kes pihak pendakwaan.

Pada akhir kes pembelaan mahkamah berpuashati bahawa pembelaan telah gagal menimbulkan satu keraguan yang munasabah dalam kebenaran kes pihak pendakwaan.

Mahkamah telah berpuashati bahawa pihak pendakwaan telah membuktikan pertuduhan terhadap tertuduh tanpa sebarang keraguan yang munasabah.

[48] Learned counsel did not argue that the findings of fact of the learned judge on Bob and Murhaban bin Umar must be reviewed. His submission is anchored on the premise that the defence evidence on Bob and Murhaban bin Umar is true and must therefore be accepted. This will amount to this court being required to make its own findings of fact. It is settled law that this

is no part of the function of an appellate court. The making of a finding of fact is a function exclusively reserved by the law to the trial court (see *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457). What an appellate court can do is to review findings of fact made by a trial court in accordance with principles which are well settled. In this regard reference may be made to *Herchun Singh & Ors v. PP* [1969] 2 MLJ 209 where Ong Hock Thye CJ said at p 211:

> An appellate court should be slow in disturbing such finding of fact arrived at by the judge, who had the advantage of seeing and hearing the witness, unless there are substantial and compelling reasons for disagreeing with the finding: see *Sheo Swarup v. King-Emperor* AIR [1934] PC 227.

[49] In *Ye Wei Gen v. PP* [1999] 4 SLR 101 Yong Pung How CJ said at pp 107-108:

> It is trite law that an appellate court will be slow to overturn the trial judge's finding of fact unless it can be shown that his decision was plainly wrong or against the weight of the evidence before him: *Tan Chow Soo v. Ratna Ammal* [1969] 2 MLJ 49, *Lim Ah Poh v. PP* [1992] 1 SLR 713, *Ng Kwee Seng v. PP* [1997] 3 SLR 205, *Yap Giau Beng Terence v. PP* [1998] 3 SLR 656 and *Syed Jafaralsadeg bin Abdul Kadir v. PP* [1998] 3 SLR 788. These cases thus stand for the principle that findings of fact by the trial judge are *prima facie* correct unless there are very good grounds for disturbing them.

[50] More recently in *Che Omar Mohd Akhir v. PP* [2007] 3 CLJ 281 Nik Hashim FCJ in writing for this court at p 294:

> It is trite law that an appellate court should be slow in disturbing a finding of facts by the trial judge unless such finding is clearly against the weight of evidence which is not the case here.

[51] The result of the line of submission of learned counsel is that the findings made by the learned judge must remain. In any event no defects can be discerned in the findings of the learned judge the relevant parts of which were reproduced earlier. The corollary is that in the light of the findings of fact of the learned judge the question of calling Bob as a witness cannot arise as he does not exist and the value of the evidence of Murhaban bin Umar will be wholly insignificant as he was not in the house of the appellant when the police arrived there. This accords with the clear law

A that where the prosecution has established its case there is no further obligation to call a particular person as a witness or to offer him to the defence (see *PP v. Chia Leong Foo* [2000] 6 MLJ 705). It must also be observed that the High Court had indeed adjourned the case once to enable the defence to call Murhaban B bin Umar as a witness which it could not do. The submission of the appellant is thus without any merit.

[52] My learned brother Zaki bin Tun Azmi PCA while agreeing with this judgment suggested some very useful and illuminating C changes which have been incorporated into it while my learned brother Nik Hashim bin Nik Ab. Rahman FCJ in agreeing with this judgment has added a supplementary judgment. In the upshot the appeal by the appellant is dismissed with the result that the conviction and sentence imposed on him is hereby confirmed.

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